1994

Shirley Carrier v. Pro-Tech Restoration : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SHIRLEY CARRIER, Plaintiff and Appellant,	)	Case No. 940550-CA
vs.	)	Priority No. 15
PRO-TECH RESTORATION dba STONE CARPETS, WILLIAM ROGER SMITH, AND PLEASANT GROVE CITY,	)	

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY
THE HONORABLE RAY M. HARDING

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TABLE OF AUTHORITIES

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JURISDICTION OF THE UTAH COURT OF APPEALS

The Utah Court of Appeals' jurisdiction over this appeal arises under Utah Code Ann. § 78-2a-3(2)(k) (1994).

STATEMENT OF THE ISSUES

This appeal presents the following issues for review:

1. Did the trial court err in granting Defendants three times as many peremptory challenges as those given to the Plaintiff?

Standard of Review: In deciding to give Defendants twelve peremptory challenges, the trial court interpreted Rule 47 of the Utah Rules of Civil Procedure. Under Utah law, an interpretation of a statute is a question of law to which the appellate court gives no deference, rather it reviews the interpretation for correctness. *State v. Larsen*, 865 P.2d 1355, 1357 (Utah 1993); *Ward v. Richfield City,* 793 P.2d 757, 759 (Utah 1990). The correctness standard means "the appellate court decides the matter for itself. . . ." *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

Plaintiff/Appellant preserved this issue in the trial court with a Motion to Limit the Defendants' Number of Peremptory Challenges. (Exhibit 1, Motion, R 381). The trial court denied the Motion. (Exhibit 2, Transcript July 15, 1993).

2. Did the trial court err in finding Defendant Pleasant Grove City 0% negligent?

Standard of Review: In reviewing a jury's verdict, the appellate court will reverse the judgment if it lacks substantial evidence to support it. *Crookston v. Fire Ins. Exch.,* 817 P.2d 789, 799 (Utah 1991). *See also, Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985) (evidence did not support jury's finding of constructive fraud); *Onyeabor v. Pro Roofing, Inc.,*

787 P.2d 525, 529 (Utah App. 1990) (no substantial evidence existed to show plaintiff was negligent).

Plaintiff/Appellant's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial, preserves this issue. (Motion, R. 832). The court denied Ms. Carrier's Motion. (Order, October 29, 1993, R. 1003.

3. Did the trial court err in refusing to give the right-of-way, jury instruction offered by counsel for Ms. Carrier?

Standard of Review: The appellate court reviews a trial court's refusal to give a jury instruction for correctness. *Ong Int'l (U.S.A.), Inc., v. 11th Ave. Corp.*, 850 P.2d 447,452 (Utah 1993). The correctness standard means that "the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *Pena*, 869 P.2d at 936 (Utah 1994).

Plaintiff/Appellant preserved this issue by objecting to the Court's refusal to give the requested instruction. (Transcript, Vol. X-R. #2532, line 24 to 2533, line 17). Plaintiff/Appellant also objected to the court's decision to give a different right-of-way instruction. (Transcript, Vol. X-R. #2538, lines 2-10).

4. Did the trial court err in allowing rebuttal witness Newell Knight to improperly testify?

Standard of Review: The appellate court will reverse a ruling on cross-examination when the trial court abused its discretion. *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920, 923-24 (Utah 1990).

Plaintiff/Appellant preserved this issue by objecting. (Transcript Vol. X-R. #2439, lines 5-14; #2478 lines 8-12; # 2524, line 18 to #2525 line 8).

DETERMINATIVE STATUTES

Jurors. Utah Rules of Civil Procedure, Rule 47 (1992).

. . . .

(b) **Alternate jurors.** The court may direct that one or two jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

(c) **Challenge defined; by whom made.** A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made.

. . .

(e) **Challenges to individual jurors; number of peremptory challenges.** The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges except as provided under Subdivisions (b) and (c) of this rule.

Right-of-way between vehicles -- unregulated intersection. Utah Code Annotated § 41-6-72 (1992).

(1) The operator of a vehicle approaching an intersection not regulated by an official traffic control device shall yield the

right-of-way to any vehicle that has entered the intersection from a different highway.

(2) Except as specified in sub sections (3) and (4), when more than one vehicle enters or approaches an intersection from different highways at approximately the same time and the intersection:

(a) is not regulated by an official traffic-control device;

(b) is not regulated because the traffic-control is inoperative;

(c) is regulated from all directions by stop signs, the operator of the vehicle on the left will yield the right-of- way to the operator on the right unless otherwise directed by a peace officer.

Utah Rules of Civil Procedure, Rule 32 (1992). Use of deposition in court proceedings.

(a) **Use of depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part of all of a deposition, so far as admissible under the rules of evidence applied as though the witness were present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of [a] deponent as a witness or for any other purpose permitted by the Utah Rules of Evidence.

Who may impeach. Utah Rules of Evidence, Rule 607 (1992).

The credibility of a witness may be attacked by any party, including the party calling him.

Mode and order of interrogation and presentation. Utah Rules of Evidence, Rule 611 (1992).

. . .

(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

. . .

Opinion on ultimate issue. Utah Rules of Evidence, Rule 704 (1994).

(a) Except as provided in subparagraph (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

STATEMENT OF THE CASE

A. Nature of the Case

Shirley Carrier filed suit on January 7, 1992 against Pleasant Grove City, William Roger Smith, and Mr. Smith's employer Pro-Tech Restoration. (Amended Complaint, R. 45). She alleged that Defendant Pleasant Grove's negligence in failing to report and replace a missing stop sign proximately caused a collision involving her and Defendant Smith. (*Id.* at 4-7, R 42-39). In addition, Ms. Carrier claimed that Defendant Smith drove his car negligently and proximately caused the collision. (*Id.* at 2-4, R. 44-42). As a result of Defendants' negligence, Ms. Carrier was seriously injured and sought to recover damages.

B. Course of Proceedings

Defendants each filed answers to Ms. Carrier's claims, arguing that Ms. Carrier's negligence caused her injuries and denying their own culpability. (R. 13, 15, 59). The Fourth Judicial District Court tried the case before a jury beginning on July 15, 1993. Testimony continued from July 15 through July 22, at which time the court recessed the case in order to hear other matters previously scheduled. (Transcript, Vol. VI-R. # 2085-2086).

Eleven days later the case resumed and the jury heard testimony on August 2 and 3, 1993. (Transcript, Vol. VII-VIII, R. 2101-2296). Again the court recessed the case and thirteen days later, on August 16 and 17, the trial continued. (Transcript, Vol. IX-X, R. 2297-2407). Another week's recess occurred and on August 24, 1993 closing arguments and jury deliberations finally took place.

C. Disposition of the Case

On August 24, the jury returned a verdict finding Shirley Carrier 60% negligent, William Roger Smith 40% liable, and Pleasant Grove City 0% at fault. (Judgment on Jury Verdict, R. 815). Ms. Carrier filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial on September 1, 1993. (Motion, R. 832). The court denied these motions on October 29, 1993. (Order, R. 1003).

Subsequently, on November 12, 1993, Ms. Carrier filed a Motion for Relief from Judgment. (Motion, R. 1011). The court, on November 24, 1993, also denied this motion. (Order, R. 1048).

Ms. Carrier filed a notice of appeal on November 23, 1993. (Notice of Appeal, R. 1036.3). On December 23, 1993, Ms. Carrier sought summary disposition from the Utah Supreme Court. The Utah Supreme Court

declined to summarily reverse the case on January 10, 1994.

STATEMENT OF FACTS

In Pleasant Grove City, on January 15, 1991, Defendant William Roger Smith drove his employer's vehicle into the path of Shirley Carrier's oncoming automobile. (Transcript, Vol. VI-R. #2041, lines 23-25). Ms. Carrier could neither stop nor avoid the resulting impact; she suffered serious injury. (Transcript, Vol. VI-R. #2042, lines 4-6).

The collision occurred as Ms. Carrier was returning home, east on 1100 North, a route she had used for the past six years. (Transcript, Vol. VI-R. #2040, lines 1-16). Ms. Carrier used 1100 North because the City had designed it as a "through" street or "collector" road with the right of way. (Transcript, Vol. IV-R. #1837, line 17 to # 1838, line 11; Vol. V-R. #1981, lines 6-16).

Defendant Smith entered 1100 North from 500 East, going south. (Transcript, Vol. III-R. #1477, lines 11-13). For more than twenty years, that intersection had been controlled by stop signs on 500 East. (Transcript, Vol. IV-R. # 1839, lines 5-14,). However, at the time of the collision, the stop sign regulating Defendant Smith and all southbound traffic on 500 East was broken off and missing. (Transcript, Vol. II-R. #1403, lines 14-16). The stop sign across the street, restricting northbound traffic on 500 East, remained in place. (Transcript, Vol. III-R. #1486, lines 7-15). A homeowner near the intersection testified that the missing stop sign had been gone for one or two days. (Transcript, Vol. III-R. #1709, lines 3-15; #1710, lines 1-14).

On January 14, 1991, the day before the collision, Pleasant Grove sent a snow plow operator and city employee, David Frye, to "cinder" the

1100 North 500 East intersection. (Transcript, Vol. IV-R. # 1893, line 22 to # 1894, line 9). It snowed the next day and Pleasant Grove again sent Mr. Frye to plow 1100 North and the streets in that area. (Transcript, Vol. IV-R. # 1894, lines 14-19). Although he could not remember his actions specifically on those two days, Mr. Frye testified that in plowing the roads he routinely would go through the 1100 North 500 East intersection six to nine times. (Transcript, Vol. V-R. #1928, lines 4-16 and #1931-33).

Under Pleasant Grove City's written policy, snow plow operators must "[b]e alert for any roads [sic] signs that are knocked down and make sure they are put back up the same day." (Transcript, Vol. IV-R. #1183, line 12 to #1884, line 1). Mr. Frye had extensive knowledge of the city signs as a snow plow operator and as the individual responsible for maintaining and repairing Pleasant Grove's signs. (Transcript, Vol. IV-R. # 1875, line 11 to #1876, line 3; #1877, lines 11-18).

In addition to snow plow operators, the City charged all of its employees to watch for missing and damaged signs. (Transcript, Vol. IV-R.#1877, line 2 to #1878, line 23). At trial, the chief of police, Michael Ferré, testified that in an average 24 hour period, police patrols pass though 1100 North 500 East between three and nine times. (Transcript, Vol. IV-R. # 1853, lines 5-14). Accordingly, on a day requiring snow plowing or cindering, Pleasant Grove City employees with the responsibility to look for missing stop signs, drove through the intersection where this collision occurred no less than nine and up to eighteen times.

Pleasant Grove City Police Chief agreed that the City expected to identify a downed stop sign within minutes or hours and not days. (Transcript, Vol. IV-R. # 1855, lines 2-15). Failure to find a missing stop sign in that amount of time would mean the City's surveillance system had

been ineffective. (*Id.* at lines 16-19). Pleasant Grove's Public Works Director also agreed that under these conditions the City's system would have failed. (Transcript, Vol. V-R. # 1981, line 17 to #1982 line 4). At trial, Defendants' expert witness testified that the City did not fall below its required standard of care. (Transcript, Vol. VIII-R. # 2249, line 24 to # 2250, line 8). Ms. Carrier's expert testified that it did. (Transcript, Vol. V-R. # 2013, lines 7-13).

Ms. Carrier filed suit against Defendants claiming negligence and seeking to recover damages. (Amended Complaint, R. 45). Each of the Defendants carried insurance from the same company, Farmer's Insurance, which arranged for counsel. (Transcript, Vol. II-R. # 1451, lines 2-7). Defendant Smith and Defendant Pro-Tech initially had the same attorney.

Prior to trial, Defendant Smith changed his testimony and averred that his employer, Pro-Tech had asked him to alter his testimony concerning the accident. (Transcript, Vol. III-R. #1517, line 21 to #1518 line 1). Defendant Smith said that Pro-Tech wanted to place more blame for the accident on Ms. Carrier. (Transcript, Vol. III-R. #1519, lines 12-25). Pro-Tech denied these charges. (Transcript, Vol. IV-R. #1827, lines 8-20). Consequently, Defendant Smith obtained separate counsel.

None of the Defendants filed cross claims against the others. Nor did the defenses offered seek to place blame on any of the other Defendants. Accordingly, Ms. Carrier's counsel moved the trial court to limit the peremptory challenges granted so that each side of the controversy would have the same amount. (Exhibit 1, Motion, R 381).

The court denied the motion, and meted out four peremptory challenges to Ms. Carrier while granting Defendants a total of twelve. (Exhibit 2, Transcript July 15, 1993). Ms. Carrier's counsel asked the court

to have Defendants state for the record the nature and extent of their adverse interests justifying the additional challenges. The court refused the request. (*Id.*).

On the first day of trial, while impaneling the jury, the court asked that each party read the names of its witnesses to the potential jurors. (Transcript, Vol. I-R. #1140). After only one Defendant had introduced his witnesses, the court concluded, without regard to the other Defendants, that all defense witnesses had been presented. (Transcript, Vol. I-R. #1166). In fact, Defendant Smith had no separate witnesses, and Pleasant Grove City only had an additional one. (Transcript, Vol. I-R. #1166).

At trial, Ms. Carrier testified that she could not see Defendant Smith approach the intersection since a tree and bushes lining 500 East blocked her vision. (Transcript, Vol. VI-R. #2058, lines 3-8). Because the shrubbery blocked her view, Ms. Carrier stated that she did not see Defendant Smith until she was about to enter the intersection. (Transcript, Vol. VI-R. #2057, lines 17-23). Ms. Carrier's vehicle struck Defendant Smith's van on the sliding door located behind the front passenger door. (Transcript, Vol. IV-R. #1739, line 23 to #1740, line 1). Ms. Carrier was to the right of Defendant Smith.

All of the Defendants listed Newell Knight as an expert witness, however failed to call him during trial. (Transcript, Vol. I-R #1166; Vol. X-R. #2439, line 22 to #2440, line 1). At the conclusion of Defendants' case, Ms. Carrier's counsel sought to use Mr. Knight's deposition for impeachment and rebuttal purposes. (Transcript, Vol. X-R. #2438, lines 18-23). Over Ms. Carrier's objections, however, the court allowed Mr. Knight to take the stand and testify. (Transcript, Vol. X-R. #2439, lines 5-14).

On direct examination, Ms. Carrier's counsel generally restricted Mr. Knight to yes or no responses on what he stated at deposition. That testimony concerned the speed of the two vehicles (Transcript, Vol. X R. #2453, line 12 to #2467 line 18) and individual reaction time. (Transcript, Vol. X-R. #2467, line 21 to #2471, line 18). Defendant's cross examination, however, invited Mr. Knight to interpret Utah law (Transcript, Vol. X-R. #2477, lines 21-23) and pointedly asked Mr. Knight which party had the right of way. (Transcript, Vol. X-R. #2478, lines 15-18). Ms. Carrier objected and the court overruled. (Transcript, Vol. X-R. #2478, lines 8-14).

Ms. Carrier tendered a jury instruction on the right-of-way statute, quoting Utah Code Annotated, § 41-6-72(2). (Exhibit 3). This section states that when two vehicles arrive at an uncontrolled intersection at approximately the same time, the vehicle on the left must yield the right of way. Defendants proffered Utah Code Annotated § 41-6-72(1), the "first in time" rule. Subsequently, the court instructed the jury using both sections of the statute, over Ms. Carrier's objections. (Transcript, Vol. X-R. #2532, line 24 to 2533, line 17; #2538, lines 2-10).

The jury returned a verdict on August 24, 1992, finding Shirley Carrier 60% negligent, William Roger Smith 40% liable, and Pleasant Grove City 0% at fault. (Judgment on Jury Verdict, R. 815).

SUMMARY OF THE ARGUMENT

The trial court improperly granted Defendants twelve peremptory challenges based on a misreading of Rule 47, Utah Rules of Civil Procedure. Under all of the rule's provisions, co-parties must exercise their peremptory challenges together. In *Randle v. Allen*, the Utah Supreme Court interpreted this to mean that unless a substantial controversy exists

between the parties they are not entitled to additional sets of challenges. 862 P.2d 1329, 1332 (Utah 1993). A substantial controversy occurs when the parties file non-derivative cross claims against each other. *Id.* at 1333.

In this case, none of the Defendants filed any cross claims. Moreover, none of the facts prove a substantial controversy between the Defendants. Therefore, the court committed reversible error when it granted Defendants eight more peremptory challenges than given to Ms. Carrier.

The *Randle* Court warned that granting one side too many peremptory challenges allows it to unfairly shape the jury to its advantage. 862 P.2d at 1334. Eight additional challenges enabled Defendants in this case to do just that. The clear weight of the evidence demonstrated that Defendant Pleasant Grove City acted negligently in failing to discover and replace a stop sign down for one to two days. Nonetheless, the jury found that the City was 0% negligent. Because substantial evidence does not support that verdict, the Court should grant Ms. Carrier a new trial.

A party is entitled to have her theory of the case presented to the jury in a clear and understandable way. *State v. Hamilton*, 827 P.2d 232, 238 (Utah 1991). Accordingly, jury instructions which present the applicable law in a confused or incorrect manner should be reversed. In this case, Ms. Carrier offered an instruction which quoted directly from the applicable Utah statute and correctly set out the governing law. The court paraphrased the law and combined it with Defendants' instruction, thereby misleading the jury.

Finally, the court improperly allowed expert witness Newell Knight to take the stand, testify outside the scope of direct examination, and to offer legal conclusions. Defendants designated and retained Mr. Knight as an expert witness and then declined to call him at trial presumably because

his deposition testimony agreed with Plaintiff's expert witness. At the conclusion of Defendants' case, Ms. Carrier offered Mr. Knight's deposition for rebuttal and impeachment purposes.

The court overruled Ms. Carrier's objections, allowed Mr. Knight to take the stand, and then to testify on matters outside the material read from the deposition. In the course of his testimony, Mr. Knight referred to the Utah traffic code as a foundation for his opinion that Defendant Smith had the right-of-way at the intersection. Mr. Knight's legal conclusions fall outside permissible testimony under Utah Rules of Evidence, Rule 704. *Davidson v. Prince*, 813 P.2d 1225, 1231 (Utah Ct. App.), *cert. denied*, 826 P.2d 651 (Utah 1991) (The rule does not allow a witness to give legal conclusions). Because the court abused its discretion in improperly allowing Mr. Knight to take the stand and testify, the case ought to be reversed and remanded.

ARGUMENT

Point 1: The Trial Court Committed Reversible Error When It Granted Defendants Twelve Peremptory Challenges.

When Plaintiff/Appellant Ms. Carrier raised the issue of peremptory challenges, the trial court announced that it would give each Defendant three challenges plus one for the alternate juror. (Exhibit 2). In spite of Ms. Carrier's objections, the four peremptory challenges doled out to Plaintiff competed against Defendants' total of twelve. The first issue in this appeal is whether the trial court erred in exceeding the statutory number of challenges awarded to a party.

A. The trial court erred in failing to comply with the Utah Rules of Civil Procedure, Rule 47.

A careless reading of Rule 47 might lead a court into mistakenly granting four peremptory challenges to every party in a multiple party case. Rule 47(e) provides that "[e]ach party shall be entitled to three peremptory challenges except as provided under Subdivisions (b) and (c) of this rule." Utah Rules of Civil Procedure, Rule 47 (1992). Subdivision (b) of the rule allows the court to give each party in the lawsuit an additional peremptory challenge to use against those called for alternate jury duty. *Id.*

However, when there are several parties on either side, Rule 47(c) restricts the grant in subsections (b) and (e). It states that the multiple parties on one side "*must join* in a challenge before it can be made." *Id.* (emphasis added). Therefore, under the most reasonable interpretation of the entire rule, each *side* of the controversy receives only one set of peremptory challenges.

Utah case law confirms this interpretation. *Randle v. Allen*, 862 P.2d 1329, 1333 (Utah 1993) (Refusing to grant additional peremptory challenges to co-parties unless they are truly adverse); *Sutton v. Otis*, 68 Utah 85, 141, 249 P. 437, 457 (1926) (same). *See also*, Annot. 32 A.L.R.3d 747, 752 (1970)("Generally speaking, a statute which allows a specific number of peremptory challenges to 'each party' . . . has been construed to permit a single set of peremptory challenges. . . .").

In this case, the trial court failed to follow the general rule. Rather, over Ms. Carrier's objections, it awarded Defendants additional challenges as if each Defendant were a separate side of the lawsuit. When Ms. Carrier suggested that Defendants relate for the record why they merited additional peremptories, the court stated that it saw no need to have them do so. (Exhibit 2, at 2, lines 8-10).

B. The trial court erred in granting each Defendant four peremptory challenges when no cross claims had been filed.

Under Utah law, co-parties may obtain additional sets of peremptory challenges only under specific circumstances. Recently, in *Randle v. Allen*, the Utah Supreme Court stated: "[E]xtra peremptory challenges should be granted to multiple parties *only* if there is a 'substantial controversy between them respecting the subject-matter of the suit.'" 862 P.2d 1329, 1332 (Utah 1993) (emphasis added)*quoting Sutton v. Otis*, 68 Utah 85,141, 249 P. 437, 457 (1926).

What is a substantial controversy within the context of Rule 47? The *Randle* Court spoke unequivocally when it stated that "In our view a 'substantial controversy' exists when a party on one side of a lawsuit has a *cross-claim* against a co-party that constitutes, in effect, a separate, distinct lawsuit from the action existing between the plaintiffs and defendants." *Id.* (emphasis added).

In order for the trial court to award more than one set of peremptory challenges to a side, the co-parties must file cross-claims against each other. Moreover, the cross-claims cannot be merely derivative of the original claims. *Id.* That is, the cross-claims will not create additional sets of challenges if they only seek indemnification or contribution. In this case, Defendants filed no cross-claims. Therefore, the trial court erred when it awarded Defendants more than one set of peremptory challenges.

C. Defendants lack substantial controversy

Because Defendants filed no cross-claims against each other, under the holding in *Randle* they do not merit additional peremptory challenges.

Defendants may nonetheless attempt to argue that a "substantial controversy" exists between them. Even if the Court rules, despite *Randle's* unambiguous language, that a substantial controversy can exist without cross-claims, the facts in this case simply do not support Defendants' claim.

In *Randle v. Allen*, Carl Allen's pickup truck struck Rosan Randle's car, resulting in her death. Mrs. Randle's husband sued Allen for negligent operation of his truck, and UDOT and Salt Lake County for negligently designing and maintaining the intersection. 862 P.2d at 1332. For his injuries, Defendant Allen cross-claimed against UDOT and the County, also alleging that the intersection had been negligently designed and maintained. *Id.* at 1333.

As in this case, the *Randle* trial court allowed each party to exercise three peremptory challenges as well as one additional challenge for alternate jurors. Like the facts here, the plaintiff had four peremptory challenges while the three defendants collectively wielded a total of twelve. *Id.* at 1132. On appeal, the plaintiff argued that the defendants with their extra peremptory challenges were able to shape the jury to their advantage. *Id.*

In reviewing the case, the Utah Supreme Court noted that defendant Allen's separate lawsuit against the other defendants aligned his interests in choosing the jurors with both the plaintiff and the other defendants. *Id.* at 1333. Accordingly, the trial court did not err when it granted Allen the additional challenges. *Id.* at 1334.

On the other hand, UDOT and the County retained the same interests in defending against both suits. *Id.* at 1333. Indeed, in language that aptly fits Defendants in this case, the *Randle* Court described the common interests linking the two defendants together. It emphasized that

"[n]either made a claim for damages against the other or against Randle or Allen." *Id.* Moreover, "[b]oth asserted that Allen and Mrs. Randle were the proximate cause of the injuries." *Id.* In addition, "they had common interests in defending the claims against them." *Id.* Therefore, the Court ruled that UDOT and the County should not have been given an additional set of challenges. *Id.* at 1334.

In this case, like UDOT and Salt Lake County in *Randle*, Defendants clearly operated under common interests. As already emphasized, they filed no cross-claims. In addition, the only defense theory put forth was Ms. Carrier's alleged negligence. Pleasant Grove City did not argue that Defendant Smith contributed to the accident; nor did Smith claim that Defendant Pleasant Grove's failure to replace the stop sign contributed.

In fact, this case is stronger than *Randle* because Defendants have additional common interests. For example, two of the three Defendants worked for the same company. These two Defendants initially had the same attorney counseling them in this case. Moreover, the same insurance company carried coverage on each Defendant and it hired the attorneys representing them.

Defendants might argue that a disagreement between Defendants Smith and Pro-Tech concerning the accident report creates controversy. This argument fails for two reasons. First, *Randle* requires that the controversy between co-parties be "substantial." 862 P.2d at 1332-33. This means that refusing to cooperate, attempting to shift liability to each other, resting defenses or claims on different sets of facts, or resorting to different legal theories simply is not enough. *Id.* Even hostility between the co-parties does not create a substantial controversy. *Id.* Here, Defendant Smith's averments that Defendant Pro-Tech instructed him to

lie, and Pro-Tech's denials, do not rise to the level of substantial controversy.

Second, the controversy must effectually put the co-parties on different sides of the lawsuit, making them adversaries. 862 P.2d at 1333. In *Randle*, the Court held that defendant Allen's allegations that the other two defendants proximately caused his own injuries placed him in direct opposition. *Id.* By contrast, in this case, Defendant Smith's allegations and Defendant Pro-Tech's denials did not even cause a change in courtroom tactics. Specifically, both relied on the same theory and the same witnesses.

Although Ms. Carrier raised the issue of peremptory challenges with the trial court several times, Defendants have yet to offer any facts proving that they operated on different sides in this controversy. Moreover, the trial court refused to require Defendants to state their adverseness for the record. Because Defendants are linked by common interests, "the trial court should have required [Defendants] to act jointly in exercising the three peremptory challenges allowed a side." 862 P.2d at 1333.

D. The trial court committed reversible error in awarding Defendants twelve peremptory challenges.

The Utah Supreme Court has warned that, when awarding additional sets of peremptory challenges, a judge "must carefully appraise the degree of adverseness among co-parties." *Randle*, 862 P.2d at 1333.[1] As *Randle*

1 The trial court must evaluate the adverseness of co-parties without relying on how the parties might characterize their interests. Therefore, even though at the hearing counsel for Ms. Carrier did not dispute Defendant Pleasant Grove City's adverseness, the appellate court should independently decide whether any of the Defendants merited additional sets of peremptories.

explains, granting one side of the case additional challenges disadvantages the opposing side. *Id.* The disadvantage is particularly egregious when a large disparity exists in the number of challenges awarded to each side. *Id.*

In this case, the trial court gave no indication that it carefully weighed the Defendants' adverseness. Responding to Ms. Carrier's motion to limit the peremptories, the court merely stated, "I feel that they are disparate enough, just by the nature of the case, to permit [granting the additional challenges]." (Exhibit 2, at 2, lines 8-10). Yet, the record reflects that the court did not see Defendants as truly adverse.

While impaneling the jury, the court asked that each *party* read the names of its witnesses to the potential jurors. (Transcript, Vol. I-R. #1140). After only one Defendant had introduced his witnesses, the court concluded, without regard to the other Defendants, that all defense witnesses had been presented. (Transcript, Vol. I-R. #1166). The court saw Defendants as a unit. And, Defendants apparently acted as a unit--Defendant Smith had no separate witnesses and Pleasant Grove City only had an additional one. (Transcript, Vol. I-R. #1166).

Without a substantial controversy between them, co-parties with additional challenges have the "opportunity to shape the jury to its advantage." 862 P.2d at 1334. In such cases, the Utah Supreme Court holds that prejudicial error occurs. No actual prejudice need be shown. *Id.* In *Randle*, the Court reversed and remanded the case because the defendants received four extra challenges. In this case, the disparity is twice as large; the trial court allowed Defendants eight more challenges. Accordingly, Plaintiff/Appellant Ms. Carrier respectfully requests the Utah Court of Appeals to reverse the trial court and remand for a new trial.

Point 2: The Jury Erred in Finding Defendant Pleasant Grove City 0% Negligent.

At the trial's conclusion, the jury, shaped by Defendants' additional peremptory challenges, returned a verdict finding Pleasant Grove City 0% negligent. It reached this result in spite of testimony by Pleasant Grove employees that the City had failed. The second issue in this appeal is whether Defendants presented "'substantial evidence . . . adequate to convince a reasonable mind to support [the jury verdict]. '" *Mountain Fuel Supply Co. v. Public Service Commission of Utah*, 861 P.2d 414, 428 (Utah 1993) *quoting First National Bank of Boston v. County Board of Equalization of Salt Lake County*, 799 P.2d 1163, 1165 (Utah 1990).

A. Marshaling the evidence

Plaintiff/Appellant Ms. Carrier sued Pleasant Grove City claiming that it was negligent in failing to timely discover and replace a stop sign. Under Utah law, negligence means the failure to use reasonable care. Model Utah Jury Inst. 3.2, April 15, 1991. Evidence supporting the jury's verdict that Pleasant Grove was not negligent is as follows:

1. City Police Officer Randy Shepherd testified that on the day of the accident the City had had a "lot of accidents that day." (Transcript, Vol. II-R.#1443, lines 9-19). He also testified that when receiving numerous police calls, the officers patrol less and may not drive through every street during the day. (Transcript, Vol. II-R.#1446, lines 15-23). In addition, Officer Shepherd doubted whether he would have driven up 1100 North on the day of the accident unless there was an accident or police call. (Transcript, Vol. II-R.#1447, lines 15-23).

2. Pleasant Grove City Police Chief, Michael Ferré, testified similarly

that a snowstorm limits patrolling. (Transcript, Vol. III-R.#1865, lines 11-17).

3. Pleasant Grove "sign man" and snow plow operator, David Frye stated on days with heavy snowstorms that not all of the streets would be plowed. (Transcript, Vol. V-R.#1937, lines 6-8). Mike Mills, Public Works Director also testified that on the day of the collision it was unlikely that the snow plow crew would have covered the entire city. (Transcript, Vol. V-R.#1991, lines 17-25).

4. J. Bruce Reading, Ms. Carrier's expert witness, said that a "gracious" standard allows a city 24 hours to receive notification of a downed stop sign. (Transcript, Vol. V-R.#2016, lines 5-23).

5. C. Arthur Guerts, Pleasant Grove's expert witness, claimed that Pleasant Grove's actions regarding the stop sign were within the accepted standard of care. (Transcript, Vol. VIII-R.#2250, lines 1-8). He also testified that any city's surveillance system is imperfect but that it will recognize a downed stop sign "within a day or two or three, perhaps even four." Any time longer than that would be too long. (Transcript, Vol. VIII-R.#2250, lines 11-24).

B. The jury lacked sufficient evidence in deciding that Pleasant Grove City was 0% negligent.

A jury verdict must be overturned if it lacks sufficient evidence to support it. *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989). Legal sufficiency derives from Rule 52 (a) which provides that findings "shall not be set aside unless clearly erroneous." *Doelle v. Bradley,* 784 P.2d 1176, 1178 (Utah 1989). A clearly erroneous finding is one that is against the clear weight of the evidence. *Id.* In this case, finding that

Pleasant Grove City had 0% fault in a collision involving a stop sign missing for one to two days is against the clear weight of the evidence.

The evidence and inferences supporting Pleasant Grove's lack of liability falls in two areas. First, city employees testified that they might not have driven through the intersection the day of the accident and therefore would not have had an opportunity to look for the downed sign. Moreover, David Frye, the City "sign man" and snow plow operator for 1100 North and 500 East, could not specifically remember if he plowed the intersection and surrounding roads that day.

The clear weight of the evidence, however, proves that Mr. Frye had plowed the intersection and neighboring roads. His boss, Dennis Carter, Pleasant Grove Street Superintendent, stated that when he drove to the intersection at the time of the collision he saw that both 1100 North and 500 East had been plowed. (Transcript, Vol. V-R.#1961, line 17 to #1962, line 8). Based on Mr. Frye's own testimony of how he typically plows those streets, he had been through the intersection at least six to nine times prior to the collision. (Transcript Vol. V-R. #1928, lines 4-16 and #1931-33). If the stop sign had been down for two days then Mr. Frye's assignment to cinder the roads on January 14, 1992 would have taken him through the intersection four more times. With both days, he would have passed the missing stop sign ten to thirteen times. Any other city employee driving on 1100 North, a busy collector road, or 500 East, would simply add to that number.

The second area of Pleasant Grove's evidence comes from expert witness C. Arthur Guerts. Mr. Guerts claimed that Pleasant Grove City had met the necessary standard of care. Basing his testimony on his experience with other communities, he argued that a city may reasonably

take up to four days to locate and replace a downed stop sign.

Mr. Guerts' testimony, however, has several fatal flaws. First he asserts that in applying the four-day standard, it makes no difference how many times city employees travel past the missing stop sign. (Transcript, Vol. VIII-R.#2272, line 21 to #2273, line 18). Under Mr. Guerts' standard, therefore, a city employee could drive through the intersection every hour, indeed every minute, and the city would not fall below the standard of care until four days had passed. (Transcript, Vol. VIII-R.#2276, lines 13-21. Testifying that the number of times through the intersection is "not relevant.").

Mr. Guerts refused to budge from this position, even though he admitted that each time an employee drove the intersection, the City had another opportunity to discover the downed sign. (Transcript, Vol. VIII-R.#2284, line 12 to #2288, line 7). He also admitted that under the circumstances he would be critical of Mr. Frye, the snow plow operator and sign man. (Transcript, Vol. VIII-R.#2288, line 18 to #2289, line 4). In fact, he would take corrective measures against Mr. Frye for his failure to discover the stop sign after passing through the intersection so many times. (Transcript, Vol. VIII-R.#2290, line 4 to #2291 line 16). Mr. Guerts' admissions belie his standard; the number of times employees pass the downed stop sign does become relevant.

Second, Pleasant Grove City employees themselves do not agree with Mr. Guerts' assessment of the City's action on the missing sign. Thus, Public Works Director Mills acknowledged that if the sign had been down several days, the City's surveillance system would have failed. (Transcript, Vol. V-R.#1981, line 17 to #1982 line 4). Furthermore, Chief of Police Ferré emphasized that he expected the City to identify a missing stop sign

in minutes or hours and not days. (Transcript, Vol. IV-R.#1855, line 2-9).

Finally, expert witness J. Bruce Reading directly contradicted testimony given by Mr. Guerts. He testified that given the number of times City employees actually went through the intersection, the City should have been aware of the missing sign. (Transcript, Vol. V-R. #2013, line 14 to #2014, line 11). Failure to discover the downed stop sign meant the City acted below the accepted standard of care. Transcript, Vol. V-R. #2013, lines 7-13). Mr. Reading emphasized the City's failure even if the stop sign had only been down one day. (Transcript, Vol. V-R. #2016, lines 10-23).

In reviewing the evidence supporting a jury verdict, the appellate court does not confirm on the basis of some evidence. *See Peterson v. Peterson*, 818 P.2d 1305, 1308 (Utah App. 1991). Rather the jury's decision must be supported by substantial evidence. *Reeves v. Gentile* 813 P.2d 111, 114-15 (Utah 1991) *quoting Seybold v. Union Pacific R.R.*, 121 Utah 61, 239 P.2d 174, 177 (1951). In this case, Pleasant Grove City failed to provide sufficient evidence that it had 0% negligence. Accordingly, Ms. Carrier respectfully requests the Utah Court of Appeals to reverse and remand the case.

Point 3: The Trial Court Erred in Refusing to Give the Right-of-Way, Jury Instruction Offered by Ms. Carrier.

" The well recognized general rule entitles a party to have his theory of the case submitted to the jury." *Watters v. Querry*, 626 P.2d 455, 458 (Utah 1981) *citing Morrison v. Perry*, 104 Utah 141, 140 P.2d 772 (1943). Moreover, the trial court must instruct the jury on the party's theory in a "clear and understandable way." *State v. Hamilton*, 827 P.2d 232, 238

(Utah 1991). Failure to meet these requirements is prejudicial error. *Watters*, 626 P.2d at 458.

In this case, Ms. Carrier presented evidence that she and Defendant Smith arrived at the intersection at approximately the same time. Expert witness Rudolph Limpert testified that Ms. Carrier was approximately 66 feet from the intersection when she first saw Defendant Smith's vehicle. (Transcript, Vol. IV-R. #1752, lines 21-25). Defendant Smith was approximately 53 feet away at that point in time. (Transcript, Vol. IV-R. #1753, lines 15-16). Ms. Carrier testified that because shrubbery lining 500 East blocked her view, she did not see Defendant Smith until she was about to enter the intersection. (Transcript, Vol. VI-R. #2057, lines 17-23). Consequently, Ms. Carrier collided with Defendant Smith's van, hitting the sliding door located behind the front passenger door and establishing that Defendant Smith entered the intersection only tenths of a second before. (Transcript, Vol. IV-R. #1739, line 23 to #1740, line 1). Ms. Carrier was to the right of Defendant Smith.

At the conclusion of trial, Ms. Carrier requested the trial court give the jury the following instruction:

> You are instructed that Utah Code Annotated § 41-6-72(2) provides: when more than one vehicle enters or approaches an intersection from different highways at approximately the same time [and] the intersection:
>
> (a) is not regulated by an official traffic-control device;
>
> (b) is not regulated because the traffic-control is inoperative; or
>
> (c) is regulated from all directions by stop signs,
>
> the operator of the vehicle on the left will yield the right-of-way to the operator on the right unless otherwise directed by a peace officer.

> If you find, after a preponderance of the evidence, that William Roger Smith was operating a motor vehicle in violation of the foregoing statute, such conduct creates a presumption of negligence.

(Exhibit 3).

This instruction quotes the statute and fairly instructs the jury as to Ms. Carrier's theory of the case: (1) Both drivers arrived at the intersection at approximately the same time; (2) from Defendant Smith's perspective the intersection was unregulated because "the traffic-control is inoperative"; and (3) Ms. Carrier was to Defendant Smith's right. Therefore, Defendant Smith had to yield the right-of-way. Moreover, from Ms. Carrier's perspective, the intersection was not unregulated. Relying on years of driving 1100 North and Ms. Carrier knew that she had the right-of-way because traffic on 500 East, including Defendant Smith, was restricted by stop signs.

Defendants argued, however that the jury ought to be given a paraphrase of Utah Code Annotated § 41-6-72(1). This section provides that the driver entering the intersection first has the right-of-way. Although this instruction may present Defendants' theory of the case, it fails to recognize that the drivers approached the intersection with different statuses and obligations.

Rather than give Ms. Carrier's requested instruction, the court paraphrased it and combined it with the one Defendants offered:

> When two vehicles are approaching an intersection at approximately the same time and distance from it, the driver approaching on the right has the right-of-way, and it is the duty of the driver approaching on the left to yield the right-of-way.
>
> A driver entering an intersection first has the right-of-way. However, a driver may not speed up to enter an

> intersection first, nor may a driver take the right-of-way by entering the intersection slightly ahead of another driver. In order for a driver approaching from the left to take the right-of-way, that driver must enter the intersection clearly ahead of the driver approaching from the right.

(Exhibit 4, Jury Instruction No. 31, R. 781).

Although the court gave Ms. Carrier's instruction in part, by combining it with Defendants' theory of the case, it failed to instruct the jury on Ms. Carrier's theory in a "clear and understandable way." *Hamilton*, 827 P.2d at 238. Moreover, the court's instruction tended to mislead the jury as to the law applicable in this fact situation. *See Biswell v. Duncan*, 742 P.2d 80, 88 (Utah App. 1987). It simply did not allow for Ms. Carrier's state of mind, or that for more than twenty years traffic on 1100 North had the right-of-way. Accordingly, Ms. Carrier respectfully requests the Utah Court of Appeals reverse and remand the case.

Point 4: The Trial Court Erred by Allowing Newell Knight to Improperly Testify.

The Utah Rules of Civil Procedure provide that a party can use a deposition for "any purpose permitted under the Utah Rules of Evidence." Rule 32(1) (1992). Furthermore, Utah's evidence rules state that "[t]he credibility of a witness may be attacked by any party. . . ." Utah Rules of Evidence, Rule 607 (1992). Pursuant to these two rules, Ms. Carrier sought to have Newell Knight's deposition read into the record. (Transcript, Vol. X-R. #2438, lines 18-23).

Defendants listed Newell Knight as an expert witness, and allowed Ms. Carrier to depose him prior to trial. (Transcript, Vol. X-R. #2439, line 22 to #2440, line 2). While taking Mr. Knight's deposition, counsel for Ms.

Carrier discovered that Mr. Knight agreed almost completely with Ms. Carrier's expert accident reconstruction witness, Rudolph Limpert, Ph.D. (Transcript, Vol. X-R. #2458, line 1 to #2461, line 11). Although they continued to hold out the possibility of using Mr. Knight during trial, not surprisingly Defendants declined to call him as a witness. Instead, Defendants called Paul Thomas Blotter. (Transcript, Vol. VII-R. #2114, line 10-13).

At the conclusion of Defendants' case, Ms. Carrier's counsel attempted to introduce the deposition of Defendants' own witness, Newell Knight. Utah Rules of Civil Procedure, Rule 32(1). Ms. Carrier intended to use the deposition to impeach Defendants' expert witness, Dr. Blotter, and Defendants' case in general. Utah Rules of Evidence, Rule 607; (Transcript, Vol. X-R. #2438, lines 18-23). Defendants had retained an expert who agreed with Ms. Carrier's version of the facts and then attempted to hide him from the jury. Over Ms. Carrier's objections, however, the court allowed Mr. Knight to take the stand and testify. (Transcript, Vol. X-R. #2439, lines 5-14).

On direct examination, Ms. Carrier's counsel generally restricted Mr. Knight to yes or no responses as to what he stated at deposition. That testimony concerned the speed of the two vehicles (Transcript, Vol. X-R. #2453, line 12 to #2467 line 18) and individual reaction time. (Transcript, Vol. X-R. #2467, line 21 to #2471, line 18). Defendant's cross examination, however, invited Mr. Knight to interpret Utah law (Transcript, Vol. X-R. #2477, lines 21-23) and pointedly asked Mr. Knight which party had the right of way. (Transcript, Vol. X-R. #2478, lines 15-18). Ms. Carrier objected and the court overruled. (Transcript, Vol. X-R. #2478, lines 8-14).

The court erred first by allowing Mr. Knight to take the stand instead

of simply allowing his deposition to be read to the jury, as permitted by Rule 32(1) URCP; and secondly, by permitting him to testify outside the scope of direct examination. Rule 611(b) states in uncompromising language: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Utah Rules of Evidence, Rule 611 (1992). As the Utah Supreme Court emphasizes, an expert witness on cross-examination properly speaks on those matters opened up in direct examination. *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920, 925 (Utah 1990).

While Rule 611 allows the court some latitude in ruling on cross-examination, generally the court should restrict questions to the issues raised on direct. *State v. Jerrell*, 608 P.2d 218, 228 (Utah 1980). Moreover, the court must keep a certain amount of control over the discussion and not allow counsel to conduct a "fishing expedition" into any matter that might appear in the witness' deposition. *State v. Clayton*, 658 P.2d 621, 623 (Utah 1983).

The court attempted to justify its ruling allowing Defendants to lead Mr. Knight into areas completely unrelated to direct examination. It explained that it had permitted both parties to exceed the scope of examinations. (Transcript, Vol. X-R. #2525, line 9 to #2526, line 1). However, all prior instances referred to by the court had involved witnesses in the respective parties' cases in chief. Defendants had deliberately waived their right to call Mr. Knight; they specifically chose not to raise the right-of-way issue in their case. By overruling Ms. Carrier's objection, the court granted Defendants impermissible license to question the rebuttal witness.

The court also erred in allowing Mr. Knight to give legal conclusions.

Utah courts have repeatedly rejected attempts by expert witness to testify on questions of law. *See e.g. Davidson v. Prince*, 813 P.2d 1225, 1231 (Utah Ct. App.), *cert. denied*, 826 P.2d 651 (Utah 1991). In *Davidson*, this same Newell Knight appearing as an expert witness attempted to testify that an individual was negligent. In upholding the trial court's rejection of Mr. Knight's attempts the Utah Court of Appeals noted that Rule 704 abolishes the per se rule against testimony on ultimate issues of fact. 813 P.2d at 1231. However, the Court emphasized, the rule does not allow all opinions. *Id.* Specifically, the rule does not permit a witness to answer questions which would merely tell the jury what result to reach. *Id.* Nor does it tolerate legal conclusions. *Id.*

In this case Mr. Knight referred to the Utah traffic code and then, over Ms. Carrier's objections, stated that Defendant Smith had the right of way. (Transcript, Vol. X-R. #2478, lines 15-18). Because Mr. Knight offered a legal conclusion, telling the jury what result to reach, his testimony should not have been allowed. Nor should the court have permitted Mr. Knight to testify outside the scope of direct examination. Nor should the court have allowed Mr. Knight to take the stand as all that counsel requested was to read portions of Mr. Knight's deposition to the jury. Accordingly Ms. Carrier respectfully requests the Utah Court of Appeals to reverse and remand this case.

CONCLUSION

The trial court erred in failing to follow the guidelines given in *Randle v. Allen*, 862 P.2d 1329 (Utah 1993). Because Defendants obtained three times as many peremptories as Ms. Carrier, they had the opportunity to shape the jury to their advantage. Not surprisingly, then, the jury

found, against the clear weight of the evidence, that Defendant Pleasant Grove City was 0% negligent. The court additionally erred in conducting an eleven-day trial over thirty-nine days, failing to submit Ms. Carrier's proposed jury instruction on the right-of-way, and allowing rebuttal witness Newell Knight to improperly testify. Accordingly, Ms. Carrier respectfully requests the Utah Court of Appeals to reverse and remand this case.

DATED this 19 day of January, 1995.

LYNN C. HARRIS
Attorney for Plaintiff/Appellant

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing on this 19 day of January, 1995, by first-class, U.S. Mail, postage prepaid to the following:

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EXHIBIT 1

PLAINTIFF'S MOTION TO LIMIT THE NUMBER OF THE DEFENDANTS' PEREMPTORY CHALLENGES

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IN THE FOURTH JUDICIAL DISTRICT IN AND FOR UTAH COUNTY
STATE OF UTAH

--oooOooo--

SHIRLEY CARRIER,	)	
	)	PLAINTIFF'S MOTION TO
Plaintiff,	)	LIMIT THE NUMBER OF THE
	)	DEFENDANTS' PEREMPTORY
vs.	)	CHALLENGES
	)	
PRO-TECH RESTORATION dba	)	
STONE CARPETS, WILLIAM and	)	Civil No. 910400680
ROGER SMITH,	)	
	)	Judge Ray M. Harding
Defendants.	)	

--oooOooo--

COMES NOW the above-named plaintiff, and pursuant to the local rules, hereby files a motion limiting the defendants' number of peremptory challenges. At the recent pretrial conference in this matter when this issue was raised with the Court, the Court stated that it was inclined to allow the plaintiff to have three peremptory challenges and since there were three defendants, to allow them a total of nine peremptory challenges.

The purpose of this motion is to bring to the Court's attention the inherent unfairness and disparity between the parties if the

defendants are allowed to join together and have triple the number of peremptories allocated to the lone plaintiff. Specifically, it is the plaintiff's request that either the plaintiff be given an identical number of peremptory challenges as the defendants or to have the number of the peremptory challenges of the defendants reduced to equal the number allowed to plaintiff. Whether this be three, six or nine, it is plaintiff's position that the peremptory challenges must be reasonable in number and approximately equal between the two sides.

I.

LAW AND ARGUMENT

Rule 47(e) of the Utah Rules of Civil Procedure states as follows:

> **Challenge to individual jurors: Number of peremptory challenges.** The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges, except as provided under subsections (b) and (c) of this rule.
>
> (b) Alternative jurors. . . .
>
> (c) Challenge to find; by whom made. A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to the individual juror. Either party may challenge the jurors but where there are

> individual parties on either side they must join in a challenge before it can be made.

At first blush, one may assume that "each party" would require three peremptories allowed to the plaintiff and three each to the defendants for a total of nine. However, a review of the limited case law it changes that initial assumption.

At 32 ALR 3rd. 747, "Jury: Number of Peremptory Challenges Allowable In Civil Case Where There Are More Than Two Parties Involved" contains an exhaustive collection of different state cases dealing with the number of peremptory challenges allowable and civil cases where there are more than two parties involved. Upon review of that annotation there are eighteen states which require the collective exercising of challenges. Under these states and their case law, each side gets only a limited number of challenges despite the number of parties. There are fifteen jurisdictions of the view where the interest of the parties are adverse, each party gets the full number of challenges. Only two states, Connecticut and Tennessee, require the plaintiff(s) and or the defendant(s) to join in their challenges no matter whether there interests are adverse.

Under statutes similar to Utah's, nine jurisdictions require joinder. Some of these statutes are interpreted by case law to allow extra challenges, Utah is one such state. In *Sutton v. Otis Elevator Company*, 68 Utah 85, 249 P. 437 (Utah 1926), the Court construed "each party" to mean each defendant where the defendant's interests

were antagonistic. In *Sutton*, plaintiffs were injured in a hotel elevator incident. Plaintiff sued the hotel and the elevator company. The elevator company wanted three challenges of its own because it claimed adverse interest to the hotel. The Court reviewed the record and arguments of counsel and came to the conclusion that the defendant's interests were antagonistic. The Court held that it was not the intent of the legislature to require clearly adverse parties to join in peremptory challenges. The language used by the Court is instructive:

> "There are no doubt many cases where the defendants are joined, in which one seeks to blame the other for the wrong or injury of which the plaintiff complains. In such cases there is no substantial reason why the defendants, for purposes of a peremptory challenge, should not be considered as being on the same side. But where the record indisputably shows that one defendant practically admits its own liability, and whether it admits it or not, substantial grounds appear for such admission, and where it further appears that such party is seeking to establish liability against the other as a foundation for recoupment of damages for breach of contract against the co-defendant, it is an unblushing travesty to hold that both parties are on the same side of the controversy in the sense intended by the statute in question. . . . No right thinking man will contend that the hotel company did not have the right to seek to charge the elevator company with the wrong complained of, if it

> believe the elevator company was responsible for the injury; but that is not the question here. The question is: Were they both on the same side within the meaning of the statute? . . . The statutes which requires the 'parties on either side to join' should only be regarded as a precaution to the trial court to see that the right of severance in challenges shall not be permitted, except in cases where it is manifest from the very nature of the case that even-handed justice requires it."

Sutton v. Otis Elevator Co,., 249 P. 437, 458 (Utah 1926).

After a diligent search, the plaintiff has been unable to find additional cases on this issue since the 1926 *Sutton* announcement. In fact, the plaintiff could only find once that *Sutton* had been cited by an Alaska court in 1954.

Plaintiff submits that it is helpful to review the State of Wyoming's statute and case law on this point. The Wyoming Supreme Court interpreted a Wyoming statute W.S. 1977 Section 1-11-202 in *Distad v. Cubin*, 633 P.2d 167 (Wyoming 1981) as follows:

> In determining whether multiple defendants constitute one side, consideration must be given to the nature of the claim against them and to whether defendant's interests are or may be antagonistic." at 171.

In applying this language to the facts in *Distad*, the Wyoming Supreme Court found the defendant's interest were adverse. *Distad*, involves a medical malpractice case with separate acts of negligence attributed to each defendant.

In applying the general rule of consideration in *Sutton* to the current facts, it is clear that the plaintiff has sued three separate parties. The plaintiff has sued William Roger Smith, the van operator and the employee of Pro-Tech Restoration dba Stone Carpets. In addition to these two parties, the plaintiff has also commenced action and filed a claim against the City of Pleasant Grove due to their failure to appropriately maintain it's streets, roadways, and signage. It is the plaintiff's position that although all three parties' interest are adverse to the plaintiff, that they are not necessarily adverse to each other. The most obvious element of this is the employee and employer relationship. It is clear that the employee was in the scope and course of his employment at the time of the facts and circumstances of this collision. In fact, Mr. Jeffs initially represented both Pro-Tech Restoration and William Roger Smith in this matter. It would seem immensely unfair and inequitable to allow a total of six peremptory challenges for the employer and the employee defendants in this collision litigation.

It is also clear that Pleasant Grove's interests are antagonistic to the plaintiff in the same identical manner as the defendant driver and employer. It is the plaintiff's intention to seek relief from both entities, both the City as well as Pro-Tech Restoration and it's employee. The plaintiff will leave it to each respective defendant to point out what, if any, adverse interests they may have between the

City and the carpet company in addition to the general adverse interest to the plaintiff.

CONCLUSION

The plaintiff submits that unless the defendants can show they are each antagonistic to each other's interest, that they should not be allowed three separate peremptories each. It is the plaintiff's intention to have their numbers reduced to at least six, and hopefully three. In the alternative, the plaintiff would be willing to have the total defendants' peremptories reduced to six and allow the plaintiff to have an equal number of peremptories.

DATED this 23 day of June, 1993.

LYNN C. HARRIS
Attorney for Plaintiff

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing on this 23 day of June, 1993, by first-class, U.S. Mail, postage prepaid to the following:

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Secretary

EXHIBIT 2

TRANSCRIPT, JULY 15, 1993

THURSDAY, JULY 15, 1993

(IN CHAMBERS PRIOR TO TRIAL)

THE COURT: WE'RE MEETING IN CHAMBERS. AND THE COURT HAS INDICATED ON PLAINTIFF'S MOTION TO STRIKE, PLUS THE SUPPLEMENTAL DESIGNATION OF WITNESSES, THAT THAT MOTION IS DENIED.

THE NEXT WAS A MOTION TO LIMIT DEFENDANTS' NUMBER OF PREEMPTORY CHALLENGES, OR IN THE ALTERNATIVE INCREASE THE NUMBER OF PREEMPTORIES PERMITTED BY THE PLAINTIFF. I'M GOING TO DENY THAT MOTION, BUT INDICATE TO COUNSEL THAT I AM GOING TO HAVE ONE ALTERNATE JUROR. AND IF YOU ALL WANT FOUR PREEMPTORIES I'LL GIVE YOU ALL FOUR, BUT OTHERWISE, ONLY UPON MUTUAL AGREEMENT.

WHAT DO YOU WANT TO DO? DO YOU WANT FOUR FOR A PREEMPTORY?

MR. HARRIS: THREE PLUS ONE? I THINK SO.

YOUR HONOR, WOULD IT BE APPROPRIATE -- I DON'T KNOW IF YOU LOOKED AT THAT CASE WE QUOTED ABOUT HOW THERE'S GOT TO BE A DISPARATE INTEREST SITUATION IN THERE -- AND I CLEARLY WILL NOT DISPUTE PLEASANT GROVE CITY HAS DISPARATE INTERESTS, BUT I'M A LITTLE INTERESTED IN HOW SMITH AND STONE HAVE DISPARATE INTERESTS. AND MR. JEFFS' RESPONSE WAS JUST THEY -- NO RESPONSE. SOMEWHERE ALONG THE LINES IF THERE'S GOING TO BE GROUNDS FOR HAVING EQUAL PREEMPTORIES EACH, I AT LEAST OUGHT TO HAVE THE

OPPORTUNITY OF KNOWING EXACTLY WHAT IT IS THAT MAKES THEM SO DISPARATE IN THEIR CLAIMS WHEN MR. MOODY GETS TO HAVE THREE AND MR. JEFFS GETS TO HAVE THREE, WHEN IN MANY RESPECTS IT IS CLOSE TO THAT CASE. IT JUST SEEMS TO ME, FOR THE RECORD, SO I CAN UNDERSTAND THAT, WE NEED TO ARGUE THAT OR DEAL WITH IT SO WE CAN ADVANCE OUR ARGUMENT NOW.

THE COURT: COUNSEL, I FEEL THAT THEY ARE DISPARATE ENOUGH, JUST BY THE NATURE OF THE CASE, TO PERMIT IT. I DON'T THINK WE NEED THAT.

THE MOTION OF PLEASANT GROVE CITY TO PROHIBIT ANY MENTION OF INSURANCE IS GRANTED, AND THE PARTIES SHOULD BE CAUTIONED NOT TO TALK ABOUT INSURANCE AS AN ISSUE.

(FURTHER MOTIONS DEALT WITH)

I, CREED H. BARKER, CSR, DO HEREBY CERTIFY THE FOREGOING PAGE TO BE A TRUE AND ACCURATE TRANSCRIPTION OF SAID PROCEEDING, TAKEN DOWN IN SHORTHAND UPON SAID DATE, AND REDUCED TO WRITING THIS 22ND DAY OF DECEMBER, 1993.

CREED H. BARKER, CSR

EXHIBIT 3

PLAINTIFF'S PROPOSED JURY INSTRUCTION 19

INSTRUCTION NO. 19

You are instructed that Utah Code Annotated § 41-6-72(2) provides: when more than one vehicle enters or approaches an intersection from different highways at approximately the same time at the intersection:

(a) is not regulated by an official traffic control device;

(b) is not regulated because the traffic control device is inoperative; or

(c) is regulated from all directions by stop signs,

the operator of the vehicle on the left shall yield the right-of-way to the vehicle on the right unless otherwise directed by a police officer.

If you find, after a preponderance of the evidence, that William Roger Smith was operating a motor vehicle in violation of the foregoing statute, such conduct creates a presumption of negligence.

EXHIBIT 4

JURY INSTRUCTION 31

INSTRUCTION NO. 31

When two vehicles are approaching an intersection at approximately the same time and distance from it, the driver approaching on the right has the right-of-way, and it is the duty of the driver approaching on the left to yield the right-of-way.

A driver entering an intersection first has the right-of-way. However, a driver may not speed up to enter an intersection first, nor may a driver take the right-of-way by entering the intersection slightly ahead of another driver. In order for a driver approaching from the left to take the right-of-way, that driver must enter the intersection clearly ahead of the driver approaching from the right.

EXHIBIT 5

JUDGMENT ON JURY VERDICT

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IN THE FOURTH JUDICIAL DISTRICT IN AND FOR UTAH COUNTY

STATE OF UTAH

SHIRLEY CARRIER	**JUDGMENT ON JURY VERDICT**
Plaintiff,	
vs.	
PRO-TECH RESTORATION dba STONE CARPETS, WILLIAM ROGER SMITH, and THE CITY OF PLEASANT GROVE,	Civil No. 910400680
Defendants.	*Judge Ray M. Harding*

The above entitled matter came on for trial to a jury with the Honorable Ray M. Harding presiding, commencing on the 15th day of July, 1993 and being continued from time to time and completing the trial thereof on the 23rd of August, 1993. The matter was submitted to the jury on August 23, 1993 on special verdict interrogatories, which were answered in pertinent part as follows:

1. At the time and place of the accident in question and under the circumstances as shown by the evidence, was the Defendant William Roger Smith negligent?

Yes___X___ No_____

2. At that time and place of the accident in question and under the circumstances as shown by the evidence, was the Defendant, City of Pleasant Grove negligent?

Yes_____ No___X___

3. Only if you marked the answer to Question 1 "Yes", answer this question. Was the negligence of William Roger Smith a proximate cause of the accident?

Yes___X___ No_____

5. At the time and place of the accident in question and under the circumstances as shown by the evidence, was the Plaintiff, Shirley Carrier, negligent?

Yes___X___ No_____

6. Only if you marked the answer to question 5 "Yes", answer this question. Was the negligence of the Shirley Carrier a proximate cause of the accident?

Yes___X___ No_____

7. Considering all the fault which caused the accident at 100%, what percentage of that fault was attributable to:

A. The Defendant, William Roger Smith __40__%
(Only if you answered "Yes" to Questions 1 and 3)

B. The Defendant, City of Pleasant Grove ____%
(Only if you answered "Yes" to Questions 2 and 4)

C. The Plaintiff, Shirley Carrier 60 %
(Only if you answered "Yes" to Questions 5 and 6)

The totals of A, B, and C must equal 100%.

The jury was polled and the above-mentioned answers were unanimous.

The court having directed that a verdict enter in accordance with the jury's answer to the special verdict interrogatories, it is

HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of the defendants Pro-Tech Restoration, dba Stone Carpets, William Roger Smith, and The City of Pleasant Grove and against the plaintiff of no cause of action and the complaint of the plaintiff is hereby dismissed with prejudice, costs to the defendants in the amount of $___ _____ to Defendant Pro-Tech Restoration, dba Stone Carpets, $_____ to William Roger Smith, and $_____ to City of Pleasant Grove.

DATED and signed this _____ day of August, 1993.

BY THE COURT:

_____
Ray M. Harding
District Court Judge